is unlawful, and it further seems to me that the agreement is unlawful *ab initio* and that section 66 of the Contracts (Malay States) Ordinance, 1950 does not apply to it. In my view section 66 of the Contracts (Malay States) Ordinance, 1950 does not apply to this unlawful agreement. Plaintiff is not seeking restoration of an advantage. Counsel for respondent-defendant submitted that the transaction is a lending and borrowing transaction. He further submitted that section 66 of the Contracts (Malay States) Ordinance does not apply to all illegal contracts otherwise contracts made illegal could be circumvented, and I think that there is some force in this submission. Counsel cited in support of his argument *Pollock and Mulla's* Indian Contract and Specific Relief Acts, 6th edition, page 371:

> "The expression 'discovered to be void' presents some difficulty as regards agreements which are void for unlawful consideration. On the one hand it has been said that the words 'agreement discovered to be void' apply to all agreements which are void *ab initio*, including agreements based on an unlawful consideration. If this view be correct it follows that the person who has paid money or transferred property to another for an illegal purpose can recover it back from the transferee under this section, even if the illegal purpose is carried into execution and both the transferor and the transferee are in *pari delicto*. It is difficult to suppose that such a result was contemplated by the legislature. Moreover it would not be correct to say that where a person gives money for an unlawful purpose the agreement under which the payment is made can be on his part discovered to be void.....it seems on the whole that the present section does not apply to agreements which are void under section 24 by reason of an unlawful consideration or object and there being no other section in the Act under which money paid for an unlawful purpose may be recovered back the analogy of English law will be the best guide."

I respectfully agree with this passage. As to the English law, I would refer to *Halsbury's* Laws of England, 2nd edition, volume 7 at p. 174:

> "Money paid in pursuance of an illegal contract can be recovered so long as the contract remains executory."

As to section 2 of the Societies Ordinance, counsel contended that this association does not come within the exception (e) because it is not carrying on business, i.e. trade with a view to profit. He asked whether a *koottu* could be termed a business without distorting the word business. He submitted that a *koottu* was not a business.

The question as to whether the *koottu* in this case is carrying on a business depends on the inference to be drawn from the facts. It has been said that an ounce of fact is worth more than a ton of law: I would prefer to express the notion as an ounce of fact will outweigh a ton of law. After mature consideration it appears to me that the *koottu* is not carried on for the purpose of the *koottu's* profit, and in my view is not carrying on a business so as to bring it within the exception (e) to the definition of society. In this regard I would respectfully agree with the judgment of Horne, J., in *Ramasamy's case, supra*, that the *kutu* in that case was illegal and I would similarly say that the *koottu* in this case is illegal. In my view the *koottu* does not fall under exception (e) of the definition of society in section 2 of the Societies Ordinance.

In the result, I am of the view that the learned Magistrate's dismissal of the claim was correct and I confirm it and dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *P. P. Nair; Shearn Delamore & Co.*

Re R. E. COLOMB, DECD.
G. E. COLOMB v. R. E. COLOMB & ORS.

[O.C.J. (Shepherd J.) April 1, 1958]

[K.L. — Originating Summons No. 152 of 1957]

Will — Construction of — Omission — Necessary implication of intention — Adopted children — Partial intestacy — Domicile in Selangor — Distribution Enactment (Cap. 71).

This was an application by the widow of the deceased asking for directions on several points arising out of the proper construction of the will of her late husband. The testator died domiciled in Selangor on December 29, 1949 having made a will, which might be described as a home-made will. The will was made on September 14, 1947. After appointing the applicant and the Public Trustees (who had renounced) as executors until such time as any one or more of his "sons" could come in and prove, the testator proceeded to devise his immovable property in the following terms: "I give and bequeath, unto my wife, Gladys Elaine and my adopted children, Ronald Evelyn, Spencer Roy and Della Elaine, 20% each, and to my sisters, Ivy Eveline Ruth and Rosalind May, 10% each as portions of my immovable property, to be finally divided after the last mentioned child, Della Elaine, attains the age of maturity or completion of her studies whichever is later." There followed a provision directing the executors, until the date of distribution, to collect and distribute the income from such immovable property in a particular way. The way indicated was the creation and maintenance of "a small reserve in any Savings Bank" for incidental expenses (which were specified) connected with the maintenance of such property. There followed a provision directed to the

contingency of the previous death of a devisee and in conclusion the following benediction: "Acceptance of the allotment by this will of inheritance, on maturity, my adopted children, Roland Evelyn, Spenser Roy and Della Elaine, are to consider themselves in relationship to each other as brothers and sisters in acknowledgment as children of the family of Gladys Elaine and Robert Evelyn Colomb absolutely. The pleasure of their adoption has been the happiness of my home. God bless you all."

The application for directions was in the following terms: (i) The deceased having by his will disposed of his immovable property only what is the position governing his movable property?; (ii) If the deceased died intestate in respect of his movable property who are his heirs in intestacy and to what share are they respectively entitled?

Held: (1) the position regarding the personal property of the testator is that it should be distributed as on an intestacy;

(2) the deceased having died domiciled in the State of Selangor, the distribution should be made in accordance with the Distribution Enactment: the adopted children are not entitled to succeed and the personal estate goes to the widow as to one half and as to the remaining moiety, the surviving sister (Rosalind) and the deceased sister's children share equally according to their stocks.

Cases referred to:—

(1) *Sutcliffe v. Sutcliffe & Ors.*, (1957) 2 All E.R. 467.

(2) *Re Smith, decd., Veasey v. Smith & Anor.*, (1947) 2 All E.R. 708.

(3) *In re Cameron* (1884), 26 Ch.D. 19.

(4) *Re Tan Lian Boh, decd., Wee Sin Choe & Anor. v. Official Assignee & Attorney-General,* (1951) M.L.J. 187.

(5) *Re Ridge's Trusts* (1872), 7 Ch. App. 665.

(6) *Mellor v. Daintree* (1886), 33 Ch.D. 198.

APPLICATION by way of Originating Summons.

M. Edgar for the applicant.

S. Sothi (*amicus curiae*) for the respondents.

Cur. Adv. Vult.

Shepherd J.: This is an application by way of Originating Summons by one Gladys Elaine Colomb through her attorney Harry Lionel Fernando asking for directions on several points arising out of the proper construction of the will of her late husband, Robert Evelyn Colomb.

R. E. Colomb died domiciled in Selangor, on the 29th of December, 1949 having made a will; the will, which might be described as a home-made will, was made on the 14th day of September, 1947.

After appointing the applicant (the widow) and the Public Trustee (who has renounced) as executors until such time as any one or more of his "sons" could come in and prove the testator proceeded to devise his immovable property in the following terms:

"I give and bequeath, unto my wife, Gladys Elaine and my adopted children, Ronald Evelyn, Spencer Roy and Della Elaine, 20% each, and to my sisters, Ivy Eveline Ruth and Rosalind May, 10% each as portions of my immovable property, to be finally divided after the last mentioned child, Della Elaine, attains the age of maturity or completion of her studies whichever is later."

There followed a provision directing the executors, until the date for distribution, to collect and distribute the income from such immovable property in a particular way. The way indicated was the creation and maintenance of "a small reserve in any Savings Bank" for incidental expenses (which were specified) connected with the maintenance of such property. There followed a provision directed to the contingency of the previous death of a devisee and in conclusion followed an injunction or perhaps it should be called, a benediction in the terms set out hereunder:

"Acceptance of the allotment by this Will of inheritance, on maturity, my adopted children, Ronald Evelyn, Spencer Roy and Della Elaine, are to consider themselves in relationship to each other as brothers and sisters in acknowledgment as children of the family of Gladys Elaine and Robert Evelyn Colomb absolutely. The pleasure of their adoption has been the happiness of my home.

God bless you all."

The application for directions is in the following terms:

"The deceased having by his will disposed of his immovable property only what is the position governing his movable property?

If the deceased died intestate in respect of his movable property who are his heirs in intestacy and to what shares are they respectively entitled?"

It will be noted that I am not asked to determine the date of distribution.

At the time of his death, besides the widow, there survived the testator, his sister Rosalind and the three children of his deceased sister Ivy; his adopted children Ronald, Spencer and Della also survived him but by virtue of the definition of "children" in the Distribution Enactment (Cap. 71, F.M.S.) they are not entitled to take any part of the personal estate or movable property of the deceased as on an intestacy. The adopted children showed remarkable indifference to the result of these proceedings since although, by leave of the Court, they were served by pre-paid registered airmail post they have entered no appearance; neither did the sister Rosalind

who was similarly served and a certificate of non-appearance was taken out in respect of them all. Unfortunately, although the attorney of the widow (the present applicant) confirmed by affidavit that they were still alive, no particulars were given of the children of Ivy, the testator's sister who pre-deceased him and they have not been served. This was a misfortune, and I wish that litigants would be more careful to ensure that all persons affected by the issue of a summons of this description are properly and individually cited as respondents in order that they may be duly served. In the present case nothing was done and no attempt was made (as it could have been) to appoint a person to represent the estate of the deceased sister. Mr. Morris Edgar who represented the applicant informed me that the personal estate of the deceased was of considerable value as it comprised, in addition to small cash balances here and there, a share in the assets of the firm known as "Colomb and Co." of which the deceased was a partner. In the schedule to the estate duty affidavit, however, the ¼ share of the deceased in the firm is shown as being of a value of only just over $7,500. However that may be, I decided it was desirable that someone should represent the interests of the adopted children and Mr. Sothi very kindly appeared a *amicus curiae* to argue the case from their point of view without any expectation of a fee.

Mr. Edgar argued that there was an intestacy on the face of the will so far as the movable property of the deceased was concerned. He referred to the cases of *Sutcliffe v. Sutcliffe & Ors.*,[1] *Veasey v. Smith & Anor.*[2] and *In re: Cameron.*[3]

Mr. Sothi agreed that whilst he could not find anything on the face of the will to support the proposition that there was not a partial intestacy, nevertheless the intention of the testator was clearly to the effect that his adopted children should share in his personal estate. Mr. Sothi incidentally referred to the provision in the 3rd paragraph:

> "Debts, Death expenses and Duties, etc. be paid as soon as conveniently may be after my demise."

and argued that accordingly all these expenses should fall upon the personal estate. This (he said) indicated an intention to dispose of the personal estate. He also referred to the injunction and benediction in the last paragraph urging that, taking the will as a whole, it was plain that the testator was well disposed towards his adopted children and would wish them to share in the distribution of his personal estate.

I gave attention to the question whether the interests of the estate of the deceased sister (Ivy) were adequately represented but, with some hesitation, I decided, that I was not compelled to adjourn the hearing for further service as the interests of Mr. Edgar's client (the widow) were the same as those of the beneficiaries of the deceased sister's (Ivy's) estate.

In accordance with established Chancery practice, however, great care should be taken to ensure that all persons whose interests are likely to be affected by a construction summons are properly before the Court, the interests of infants being represented by a guardian *ad litem* formally appointed by the Court; if this be not done decisions are liable to be set aside *ex debito justitiae* — and rightly so. Although this may involve greater work for solicitors and counsel it is the only safe rule to follow and I wish to impress the rule upon those concerned. Following such rule may avoid a great deal of hardship and expense later on: in the present case I warned myself of this danger but decided for the reasons stated that I could continue with the hearing.

At the conclusion of the argument, I asked Mr. Sothi how he considered I should reply to the questions which had been put to me and he replied (and I confess I could not quite follow his reasoning) that, as to the first question, it seemed to him that there was an intestacy but as to the second (which should of course be expressed "what persons are entitled to be regarded as beneficiaries and to what shares are they respectively entitled?") that the persons entitled were the widow and the 3 adopted children, the widow taking ¼ and the children ¾ to be shared between them equally. He referred to Rules 2 & 4 of the Distribution Enactment. As I understood his argument which included a reference to a judgment of Brown J. in *Re Tan Lian Boh (decd.), Wee Sin Choe & Anor. v. The Official Assignee & the Attorney-General,*[4] as the testator had created an intestacy in respect of his personal estate on the face of the will but had not indicated on its face that they were not to share as on an intestacy but on the contrary had given a distinct indication of his fondness for them, then they should share as on an intestacy.

But the case quoted was only authority for the proposition that one of the widows of a Chinese testator, or indeed any other legatee, should not share on an intestacy where the will by its terms plainly indicates that the testator

intended the legatee to take only the legacy — in that case $25 for which provision was made in the will. In my view that case gives no assistance to me in my present task.

In the case of *Re Smith, decd., Veasey v. Smith & Anor.*[2] quoted above, however, Vaisey J. made observations which are directly in point. His observations appertain to the situation in which an obvious omission is observed on the face of the will. In that case, by clause 6 of her will, the testatrix provided as follows:

"In the event of my husband predeceasing me or if surviving my death dying within one calendar month of the date of my death the following clauses of this my will shall operate."

The will, on the face of it, taken as a whole made it perfectly plain, according to the learned Judge, that the testatrix, far from desiring that her estate should be distributed as on an intestacy in the event not provided for viz., in the event of husband surviving her for more than a month, desired that, in such a contingency, he should succeed absolutely to the whole of her estate. And he ordered accordingly that the will should be so construed.

Quoting *Jarman* on Wills, 7th ed., Vol. 1, p. 556, he said: "the matter is expressed thus:

Where it is clear on the face of a will that the testator has not accurately or completely expressed his meaning by the words he has used, and it is also clear what are the words which he has omitted, those words may be supplied in order to effectuate the intention, as collected from the context.

and he continued:

I venture to think it as an accurate statement of the law and of the principles which it is my duty to apply.

These are also the principles which in my view it is my duty to apply in the present case.

Continuing with the judgment of the learned Judge, he said (at p. 711):

"In *Re Ridge's Trusts*[5] Sir William James, L.J., implied certain cross limitations which had been omitted from the will and which he thought the general scheme of the will required to be inserted. In his judgment, he says (7 Ch. App. 668):

'It is a case in which we are authorised and bound to fill in the will, and to supply the gaps by judicial implication of the testator's meaning...the Court is not striking out a single word; it is not contradicting anything in the will, but it is giving to every sentence its plain, grammatical, and ordinary meaning. If any of the events provided for happen, then the will takes effect according to its letter. The implication only applies to events for which the testator has not in terms provided, but as to which no person applying merely common sense to the will can have any doubt what he intended.'

I am inclined to think in the present case that counsel have given me credit for what the Lord Justice calls 'common sense' and I am entitled to hold that in the light of common sense I am justified, and, indeed, bound, to imply a gift to the husband in the event which has happened."

In *Mellor v. Daintree*[6] the facts were not very like the facts in the present case, but the judgment of North, J., contains enunciations of the appropriate principle. He says at p. 205:

I decline altogether to decide the case on any mere conjecture of what the testator intended. It is unnecessary for me to refer to any authorities other than two (*Sweeting v. Prideaux* and *Towns v. Wentworth*). In the former case Hall, V.C., quoted the words of Knight-Bruce, L.J., in *Key v. Key*: "In common with all men I must acknowledge that there are many cases upon the construction of documents in which the spirit is strong enough to overcome the letter; cases in which it is impossible for a reasonable being, upon a careful perusal of an instrument, not to be satisfied from its contents that a literal, a strict, or an ordinary interpretation given to particular passages, would disappoint and defeat the intention with which the instrument, read as a whole, persuades and convinces him that it was framed. A man so convinced is authorised and bound to construe the writing accordingly."

Referring to the question whether or not the missing words should be supplied "as a matter of necessity" the learned Judge said:

"I am bound to say that, if I had read this will in draft and had been asked whether I saw anything the matter with it, it would, I think, have leapt to the eye that there was an omission of a provision operating in the alternative. The question is whether, having come to that conclusion, I am able to say as a matter of necessity, that is to say, 'not natural necessity,' or necessity in a definite and adequate sense, but because of 'so strong a probability of intention, that an intention contrary to that which is imputed to the testator cannot be supposed.' I quote those words from *Wilkinson v. Adam* which is referred to in *Hawkins* on Wills, 3rd ed. p. 8.

Looking at this will again and being asked, as I am asked, to consider not only the question whether there has been an omission, but also the question whether I can guess with reasonable certainty, as a matter of necessary implication, what the omission was, I feel reasonably sure that the omission was not of a very large number of words, but probably of quite a few words, and I should certainly come to the conclusion that what the lady meant was that, if her husband survived her sufficiently long to take charge of her estate, he was to have it. I refer again to *Hawkins* on Wills, p. 8, to the report of *Coryton v. Helyar*, where these words are quoted:

'There is hardly any case where an implication is of necessity, but it is called "necessary" because the Court finds it so to answer the intention of the devisor.'

Here I find without question an obvious omission, and I think I am entitled, as a matter of necessary implication, in the sense in which those words are used in the quotation to which I have referred, to find that what has been omitted is a gift to the testatrix's husband."

The question arises whether I also, having read the will, should find as a matter of necessary implication that words have been omitted; that

there is an obvious omission which it is my duty to supply.

As with the learned Judge, in the case cited, I am bound to say, that had I read the will in draft, it would have leapt to the eye that there was an omission in respect of the testator's personal estate, i.e., in respect of (as we should say in Selangor) his movable property. That is not to say, however, that I am bound to provide words supplying the omission. In point of fact, I do not find it so by necessary implication that the testator desired to dispose of his personal estate at all. The reason I say that is that his personal estate, apart from a few cash balances in the bank and elsewhere which are of no great value, are entirely his share of the assets of the firm of Colomb & Co. of which he might have supposed (though erroneously) that he was not in a position to make a distribution by will. Many people in this country have entered into partnership arrangements of a vague kind often not committed to writing and are far from clear as to what happens in the event of the death of one of the partners or of they themselves. I have found that this confusion is widespread in this country. I do not know the facts and it may well be that there is a partnership agreement providing on a dissolution for a sale of the testator's interests in the firm or as the case may be. Whatever the facts may be, in this respect in the circumstances I cannot conclude as a matter of necessary implication that the testator had any intention at all of distributing his personal estate by will still less of providing that his adopted children should share in the distribution of such estate. That being so I answer the questions in the following way:

(1) In my opinion the position regarding the personal property of the testator is that it should be distributed as on an intestacy.

(2) The deceased having died domiciled in the State of Selangor, the distribution should be made in accordance with the Distribution Enactment; the adopted children are not entitled to succeed and the personal estate goes to the widow as to ½ and as to the remaining moiety, the surviving sister (Rosalind) and the deceased sister's children share equally according to their stocks.

Costs as taxed between solicitor and client to be paid out of the estate.

Order accordingly.

Solicitors: *Bannon & Bailey; S. Sothi.*

Re FOO CHEE HEI, An Infant; KOK SU-WIN (f) v. FOO LUM CHOON

[O.C.J. (Smith J.) March 15, 1958]

[K.L. — Originating Summons No. 194 of 1957]

Practice and Procedure — Guardianship of infants — Proceedings for custody of infants — Civil Procedure Code (Cap. 7), s.472 — Civil Law Ordinance, 1956, s.27 — "Law to be administered" — Meaning of — English R.S.C., O.55A r.2 (b).

By section 27 of the Civil Law Ordinance, the "law to be administered" in all cases relating to custody and control of infants shall be the law of England. There being no specific provision in the Civil Procedure Code regulating procedure for applications for custody, the expression "law to be administered" means the whole of the English substantial law and the procedure it prescribes by R.S.C., O.55a, r.2(b), and therefore the proceedings were properly commenced by Originating Summons.

Cases referred to:—

(1) *Re Powers*, 30 Ch.D. 291.

(2) *V. Solai v. Mariayee*, (1954) M.L.J. 256.

ORIGINATING SUMMONS.

B. K. Das for the plaintiff.

R. Ramani for the defendant.

Cur. Adv. Vult.

Smith J.: This is a summons taken out by the defendant for an order that this originating summons is not the proper procedure for appointing a guardian of an infant where disputed questions of fact depending on oral evidence have to be decided.

The present state of the proceedings is that the plaintiff has taken out an originating summons supported by her own extremely lengthy affidavit and by three affidavits of witnesses to certain of the incidents alleged by the plaintiff. The plaintiff goes into the marital life of herself and her husband, the respondent, in great detail over a number of years, sets out the circumstances in which she alleges the child was taken from her and generally attempts to shew that it is in the interest of the child that she should be his guardian.

The defendant has entered a conditional appearance and taken out a summons in chambers raising as one of its points for the Court's decision the point referred to in the first para